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No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, Debtor, *Petitioner*

v.

GEORGE C. MOORE, JR., *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent has charged we were inaccurate in our statement of the case in our petition for writ of certiorari. In view of that charge, we respectfully request the court to allow this reply:

Respondent says we were wrong in stating that Sheffield's letter offered to allow Moore to resume service if he passed the physical examination and safety rules test and that charge, in setting out the language in italics as well as in quotation marks, would lead one to think that the challenged statement was made as a quotation. It was not and

in each of the three instances of which complaint is made, we referred to the particular letter and to its being attached as an exhibit. If we were endeavoring to mislead or misconstrue the letter, we certainly would not refer to an appended copy of it.

We still say that our statement of the letter is correct. In the trial court, counsel for respondent had his client identify the letter and then asked respondent what Sheffield's words "other requirements" referred to. The answer was:

> "Oh, I supposed that they referred to the examination upon the book of rules." (R. 323)

Similar testimony was given by Moore on his deposition. (R. 87) No testimony of a different meaning was given. We submit that our statement was correct. It was based upon respondent's testimony, so he should not complain of it.

Respondent then says that we were inaccurate in our statement that Moore took the position that submission of any question of physical ability to work to a board of three doctors had, by custom, become part of the collective bargaining agreement. The record filed in the Court of Appeals, at page 1013 shows that respondent demanded, and petitioner produced, a letter from B. W. Proctor, of petitioner's personnel office, to Sheffield that Moore should be examined by a three doctor board. Such record at page 304 shows Moore testified that in handling this matter with Assistant General Manager Johnson he stated he would present himself to three doctors. Such record shows at page 316, Moore's appeal to Sheffield, that he wrote that Gregory, former assistant general manager of petitioner, said the mat-

ter should have been handled "in the usual manner of the company and ~~me~~ we each appointing a doctor and the two doctors appointing a third and all concerned abiding by their decision." Respondent offered this letter in evidence (1) to show notice of this claim; (2) on the question of arbitrary action; and (3) "also, your honor, for the purpose of showing that Mr. Moore offered to be examined by any doctor or set of doctors" (R. 318). We believe our statement was, and is, justified by the record.

Lastly, respondent says we were inaccurate in stating that the jury found respondent was disabled when he applied to the superintendent and on other dates, submitted to the jury, prior to May 29, 1952. The verdict form given to the jury and their answers were:

> "1. Was George C. Moore, Sr., physically able to perform his duties as a conductor on or about the following dates?
>
> "(a) February 20, 1951?
>
> "Answer 'yes' or 'no'. Answer: No.
>
> "(b) March 6, 1951?
>
> "Answer 'yes' or 'no'. Answer: No.
> . . . " (R. 217).

Inaccuracies in Respondent's Brief in Opposition to Petition for Writ of Certiorari

Respondent's brief, page 2: "Having recovered from his injury, on February 15, 1951, he presented himself to petitioner's superintendent to return to work . . . " The record: petitioner was not physically able to perform his duties. See jury verdict above.

Respondent's brief, page 2: "Dr. Sublett then made only a most perfunctory examination of plaintiff." The record:

that was plaintiff's contention, but the jury found against Moore's contention of a perfunctory examination and arbitrary treatment of Moore. The verdict form and the answer by the jury were that Dr. Sublett's finding that Moore was unable to resume his duties was not arbitrary (R. 218). Dr. Sublett testified he gave Moore the usual examination (R. 796), that Moore's version of examination was incorrect (R. 828), that he did not examine just on his knowledge of Moore's condition, but gave another physical examination (R. 799), and that he gave Moore the same examination and consideration he would have given any other person (R. 805).

Respondent's brief, page 3:

> " . . . after respondent was examined by other doctors and tendered to petitioner the reports of such examinations showing him to be in good health and sound physical condition, *petitioner then assigned as an additional reason* for denying respondent return to work, the fact that respondent was receiving annuities from the Railroad Retirement Board." (Emphasis added).

The record: the officials involved after the examinations referred to are Johnson, Sheffield and Short. Respondent's testimony is that Johnson told Moore "We are going to stand on the decision of our doctor" (R. 304). No mention is made of any receipt of annuities. Sheffield's decision was communicated by letter appearing at page 34 of the appendix to our petition. It denies his *claim for time lost* because of the annuity, but does not mention the annuity in connection with any return to service. Short's decision was likewise by letter. It did say that Moore could not be returned to work *while* he was receiving annuity on the basis of total and permanent disability, but it did not say Moore

could not return to service after he quit drawing annuity. It referred to Sheffield's letter as to what would be necessary for Moore to resume service and renewed the offer in that letter (R. 331-2). So respondent is incorrect in stating the annuity was assigned as a reason for not allowing Moore to return to work.

Respondent's brief, page 4: "Despite his efforts to have such annuities stopped, the Railroad Retirement Board continued to send them to him;" The record: the trial court would not allow evidence as to Moore's communications with the Board (R. 280, 283, 307), and would not allow evidence or argument as to the good faith of Moore's claim he tried to have such annuity stopped (R. 1046). In pretrial deposition Moore swore that he never unqualifiedly asked the Board to stop his annuity, but just told them he didn't want the annuity if it would interfere with his going back to work. (R. 83-84).

Respondent's brief, page 12: "The record contains considerable undisputed evidence of respondent's efforts to get the Railroad Retirement Board to stop sending him annuity payments as soon as he learned that Petitioner assigned that as an additional reason for denying him the right to return to work". The record: (1) see above that the receipt of such benefits was not assigned by petitioner as a reason for not returning him to work but as a reason for denying his claim for time lost; (2) there was no evidence admitted to show respondent's efforts to stop the annuity. Conversations and communications between respondent and the Board were excluded as hearsay (R. 280, 283, 307). The trial judge would not allow evidence or jury argument as to the good faith of respondent's claimed efforts to stop the annuity (R. 1046). See above that actually respondent didn't try to stop the payments; he just said he didn't want them

if they would prevent or prejudice his right to return to work.

In this connection, petitioner calls attention to the fact that it has never been contended that the acceptance of benefits has a prospective operation to prevent respondent from a later return to work, but rather has contended and does contend that the acceptance of such benefits prevents respondent from claiming damages for not working and from contending that he was able to work *at the time* he accepted disability annuity. In other words, the acceptance today of any annuity payment, made because of disability, precludes respondent from saying he is not disabled today and at all times since the previous payment, but it will not as a matter of law preclude respondent from saying he was able to work at a later date.

Respondent's brief, page 13: " . . . the trial court properly found that respondent had done all that was required of him to have such annuity payments stopped . . . " The record: see above that no evidence as to that was admitted. The court could not make such a finding without evidence. Additionally, the court made no such finding. The record referred to by respondent is not a finding, it is a statement by Judge Allred, early in the trial, that respondent

> "*said*, this morning, that he tried to get loose from it and couldn't. *I don't want to go any farther with that.* He is not bound by what the Railroad Retirement Board said and the jury is not bound by it either." (R. 422, emphasis added).

Certainly if that was an issue being decided by the court, he would not have cut off evidence, as he did, by the statement he didn't want to go farther with it and by his excluding evidence as to it (R. 280, 283, 307).

Respondent's brief, page 14: "Thus it is seen that an employee must return to work before his annuity payments stop." The statute which respondent quoted says "no longer disabled" and "ceases to be so disabled". We submit that such words of the statute are not synonymous with "return to work". In workmen's compensation law particularly, there is a multitude of cases holding that an employee's returning to work does not necessarily mean he is not disabled. So the fact of not working does not mean disability and the fact of working does not mean ability to work.

Respondent's brief, page 16, referring to the verdict that petitioner was arbitrary in not allowing respondent to resume work: "Petitioner does not say—he cannot say that there is not substantial evidence to support the jury's verdict." The record: The first point in our motion for rehearing in the Court of Appeals was:

> "The court erred in holding that the jury verdict that appellant arbitrarily refused to return Moore to service May 29, 1952, was supported by substantial evidence."

One of the points of our trial court motion, after verdict, for judgment was:

> "The answer of the jury to special issue 2(c) that the defendant was arbitrary May 29, 1952, in refusing to permit Moore to resume his duties is without any support in the evidence. On that date, Sheffield offered to allow Moore to return to service if he passed a physical examination. They didn't refuse to allow him to work, much less do so in an arbitrary manner." (R. 1057-8).

We regret our brief in the Court of Appeals is not in the record and so cannot be referred to. Our petition for writ

of certiorari certainly shows we feel there is no support for the jury verdict.

Respondent's brief, page 16: "The jury, on substantial evidence, has found there was a wrongful discharge;" the record: the issue and jury finding referred to was that the defendant's refusal to permit Moore to resume his duties was "arbitrary". No issue was submitted as to whether defendant refused to permit Moore to resume his duties on that date, or whether that was a discharge; the only issue was the arbitrariness of a refusal which the issue assumed to exist. The court instructed the jury that if Moore "was able to go back to work, then refusing to permit him to do so would amount to, in law, a discharge . . . " (R. 1033). Defendant objected to such. (R. 1042-3).

Petitioner regrets the necessity for taking so unusual a step as to tender a reply to a brief in opposition to petition for writ of certiorari. However, in view of the charges and inaccuracies in that brief, we request that this reply be allowed.

Respectfully submitted,

PALMER HUTCHESON,
Attorney for Petitioner,
Houston, Texas

LESLIE S. LOCKETT
Of Counsel
Corpus Christi, Texas

I hereby certify that a copy of the above reply has been mailed to counsel of record for respondent contemporaneously with its filing.

FILED
AUG 22 1955
HAROLD B. WILLEY, Clerk

No. [redacted]339

In the

Supreme Court of the United States

OCTOBER TERM, 1954

GEORGE C. MOORE, SR.,
Cross-Petitioner,

v.

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, Debtor,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit (and Brief in Support of Cross-Petition)

DAVID H. NUTT,
1424 K. Street, N. W.,
Washington 5, D. C.,
Attorney for Cross-Petitioner.

Of Counsel:
J. MARVIN ERICSON,
Corpus Christi, Texas.

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CROSS-PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit (and Brief in Support of Cross-Petition)

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Cross-Petitioner respectfully shows:

Opinions of the courts below:

This case originated in the United States District Court, Southern District of Texas, and was appealed to the United States Court of Appeals, Fifth Circuit. The trial judge

filed three memorandum opinions, dated April 29, 1953, November 19, 1953, and April 16, 1954. The opinion of the Court of Appeals was published at .... *F. 2d* .... The memorandum opinions of April 29, 1953, and of November 19, 1953 (without footnotes), were attached to the opinion of the Court of Appeals and published with it.

JURISDICTION OF THE SUPREME COURT

The judgment of the trial court was entered April 12, 1954. The judgment of the Court of Appeals was dated and entered April 22, 1955. Petition for rehearing in the Court of Appeals was denied by that court May 24, 1955.

Jurisdiction to review, by writ of certiorari, the judgments of the trial court and Court of Appeals is conferred on this court by Section 1254 of Title 28 of the United States Code.

Cross-Respondent, as petitioner in his petition for certiorari, having filed a transcript of the record, no additional record to that filed by Cross-Respondent is filed in connection with this cross-petition. (Revised Rules of the Supreme Court of the United States, Rule 21, Section 5.)

QUESTION PRESENTED FOR REVIEW

Whether a railroad employee, employed under a contract for life-time employment, is limited to the recovery of damages for wrongful discharge to damages which have accrued to the time of trial.

STATUTE INVOLVED

This question does not involve the construction or application of any statute. Hence, no statutes are cited.

STATEMENT OF THE CASE

Cross-Petitioner, an employee of Cross-Respondent since November 1, 1929 (R. 12, 25, 242), under a continuing contract of employment (R. 12), was wrongfully discharged on May 29, 1952. (R. 218.) To recover damages for such wrongful discharge, Cross-Petitioner instituted his action in the United States District Court for the Southern District of Texas, Corpus Christi Division, which cause was tried upon Cross-Petitioner's amended complaint, filed March 9, 1953. (R. 23-37.)

By such amended complaint, Cross-Petitioner sued Cross-Respondent for damages for such wrongful discharge, seeking past damages and future damages based upon his life expectancy.

The cause proceeded to trial before the Court with the aid of a jury and was submitted to the jury upon four special issues (R. 217-219, together with the Court's Charge to the Jury. (R. 102, et seq.)

By the Court's charge, he limited Cross-Petitioner to recovery of damages for breach of contract and wrongful discharge to the time of trial (R. 1033), basing such ruling on the holding in *Eubanks v. Galveston, H. & S. A. Ry. Co., 59 S. W. 2d 825.* (R. 1030.) Cross-Petitioner duly and timely objected and excepted to the charge of the Court

limiting recovery to the time of trial, contending that he was entitled to recover damages for loss of future earnings, loss of increased pension rights and annuities, and loss of increased value of his seniority rights, all of which he would have acquired by further service under his contract. (R. 1041.)

Trial to the jury was concluded by their verdict, which was accepted and filed by the Court on January 29, 1954. (R. 217-219.)

Cross-Petitioner duly filed and presented alternative Motions for Judgment (R. 1060), and on April 12, 1954, the trial court rendered judgment for him against Cross-Respondent for the sum of $6,960.00 (R. 1082). Cross-Petitioner duly and timely filed and presented his Motion for Further or New Trial on specified issues (R. 1084-1087), which was overruled by the trial court (R. 1087). Cross-Respondent appealed and Cross-Petitioner cross-appealed to the United States Court of Appeals for the Fifth Circuit (R. 1109-1110), which latter court, by its opinion and judgment, affirmed the appeal and cross-appeal, thereby affirming the ruling of the trial court in limiting Cross-Petitioner's recovery to damages sustained to the date of trial.

At the time Cross-Petitioner entered Cross-Respondent's employ, there existed a collective bargaining contract between the Order of Railway Conductors and Cross-Respondent; such collective bargaining contract formed and became a part of the employment contract between Cross-

Petitioner and Cross-Respondent, and such contract was in effect on January 20, 1954. (R. 190, 192.) Such contract was and is a continuing contract. (R. 12.) There is no compulsory retirement age for conductors employed under such contract; and there is no compulsory retirement age provision in the employment contract of Cross-Petitioner. (R. 193.)

The collective bargaining contract in question contains only one provision pertaining to its term or duration, which reads as follows:

> "The Company will furnish a copy of agreement to all Conductors in service. Same is effective October 1st, 1924, and is effective for a period of one (1) year, and thereafter until 30 days' notice in writing has been given either party to the other, listing changes desired, conferences shall be held immediately upon the expiration of 30 days' notice, unless another date is mutually agreed upon." (R. 36.)

GROUNDS FOR JURISDICTION OF THE TRIAL COURT

The trial court had jurisdiction by virtue of the amount in controversy and diversity of citizenship.

ARGUMENT

Since the collective bargaining contract forming a part of Cross-Petitioner's contract of employment contained no specified term for its continuance and was and is not unilaterally terminable by Cross-Respondent, and specifically provides that it shall continue in effect until termi-

nated or altered by mutual agreement, Cross-Petitioner was and is entitled to recover for wrongful discharge, damages based upon his life expectancy.

In the case of *Eubanks v. Galveston, H. & S. A. Ry. Co., 59 S. W. 2d 825*, the only authority relied upon by the trial court in limiting Cross-Petitioner to the recovery of damages to the time of trial, an entirely different contract was involved.

That case involved a collective bargaining contract which contained a provision for a unilateral termination at the end of any year, by either party giving the other 90 days' prior notice, which provision is quoted on page 826 of the opinion of the Court, in the following language:

> "* * * provided that any party signatory hereto may withdraw at the end of any year upon serving written notice of its intentions to withdraw not less than ninety days prior to the expiration of such year * * *."

The Court then says:

> "The clause quoted expressly provides that either party may withdraw from the contract at the end of any year upon serving written notice of its intentions so to do not less than ninety days prior to the expiration of such year. This clause in the contract precludes any recovery for anticipatory breach for the life expectancy of Eubanks. * * * If Eubanks had an unconditional contract of employment for his natural life, the time of his expected death could be legally ascertained by reference to mortality tables. * * * However, in the case at bar we have absolutely no way of knowing how long the contract made the basis of this

> suit will be kept in operation, except for the current year, and the year following, where the time for notice for withdrawal has expired."

Thus, it is seen that the decision upon which the trial court based his ruling limiting recovery of damages to the time of trial, involved a contract which was unilaterally terminable. The contract here contains no such provision. On the contrary, it expressly provides that it shall continue in effect, subject to changes being mutually agreed to on stipulated procedure. (R. 251.)

Under the rule that where a contract of employment expresses no definite term of employment, its tenure is determined by the intent and understanding of the parties, to be ascertained by consideration of the nature of the employment, usages of the business, the situation of the parties, and the objects in view. *(35 Amer. Jur., Sec. 19, pages 456-7.)* Cross-Petitioner's contract was one for life-time employment, to continue to his voluntary retirement, subject only to discharge for cause.

Such contract is not so indefinite by the uncertainty of Cross-Petitioner's length of life as to preclude recovery of substantial damages for wrongful discharge. The damages recoverable are wages lost to time of trial, plus loss of future wages based on his lifetime expectancy. *Moore v. Illinois Cent. R. Co., 112 Fed. 2d 959, reversed on other grounds, 61 S. Ct. 754, 313 U. S. 630; Nichols v. National Tube Company, 122 Fed. Supp. 726 (no appeal history); Mansell v. Texas & P. Ry. Co. (Tex. Comm. App.), 137 S. W. 2d 997; G. A. Kelly Plow Co. v. London (Tex. Civ.*

App.), 125 S. W. 974; Slabon v. St. Louis Car Co. (Mo.), 102 S. W. 2d 939; Knudsen v. Green (Fla.), 156 Sou. 240; 56 C. J. S. 467, Sec. 58.

Since Cross-Petitioner's contract was not unilaterally terminable upon the part of Cross-Respondent, under the authorities above cited, and by its own provisions, the wrongful discharge of Cross-Petitioner by Cross-Respondent on May 29, 1952, deprived Cross-Petitioner of his contract right to work at his employment from that date, during his life expectancy. As a result thereof, Cross-Petitioner was damaged by reason of being so deprived of the right to work at his employment throughout such time. Cross-Petitioner is entitled to recover in one action, all of his damages occasioned and sustained by such wrongful conduct of Cross-Respondent; thereby, avoiding a multiplicity of suits.

CONCLUSION

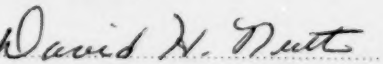
In conclusion therefore, it is respectfully submitted that the District Court and the Court of Appeals erred in applying the law of Texas in limiting and restricting Cross-Petitioner's recovery to damages to the date of trial and in denying him a recovery of future damages calculated upon his life expectancy.

We further conclude that this is a case in which a writ of certiorari should be granted under Rule 19, Section 1(b) of this Honorable Court.

Cross-Petitioner prays that this application for such writ be granted and upon hearing, that portion of the

judgment of the Courts below, limiting and restricting Cross-Petitioner's recovery for wrongful discharge to damages to the date of trial, be reversed.

Respectfully submitted,



DAVID H. NUTT,
1424 K. Street, N. W.,
Washington 5, D. C.,
Attorney for Cross-Petitioner.

Of Counsel:
J. MARVIN ERICSON,
Corpus Christi, Texas.

APPENDIX

OPINION OF THE UNITED STATES COURT OF CIVIL APPEALS, FIFTH CIRCUIT.

April 22, 1955

Before HOLMES and RIVES, Circuit Judges, and THOMAS, District Judge.

HOLMES, Circuit Judge: On November 1, 1929, George C. Moore, Sr., appellee, entered the employment of the St. Louis, Brownsville & Mexico Railway Company, of which Guy A. Thompson is Trustee. At the time of his entering such employment, there existed a collective bargaining agreement between said railroad and the Order of Railway Conductors of America, which became part of Moore's contract of employment. Said collective bargaining agreement was a continuing contract for one year after its effective date, and thereafter until 30 days' notice in writing had been given by either party to the other; and said agreement was still in force at the time of the trial of this case.[1] The contract between Moore and the said railway company was made in Texas, was intended to be performed in Texas, and is alleged to have been breached in Texas. No federal question is involved in this controversy as an integral part of the plaintiff's case, though many federal questions are raised in defense thereof. Federal jurisdiction depends

[1] "The Company will furnish a copy of agreement of all Conductors in service. Same is effective October 1st, 1924, and is effective for a period of one (1) year, and thereafter until 30 days' notice in writing has been given by either party to the other, listing changes desired, conferences shall be held immediately upon the expiration of 30 days' notice, unless another date is mutually agreed upon."

solely upon diversity of citizenship between the parties, and the requisite jurisdictional amount.

In January, 1946, appellee was injured on the job, sued appellant, and recovered a judgment against him for damages under the Federal Employers Liability Act. Thereafter, he applied for and was awarded disability payments by the Railroad Retirement Board, and received such payments up to the date of the trial of this case. On February 15, 1951, and at other times, having allegedly recovered from his disability, appellee requested that appellant restore him to active service, which requests, he claimed, were arbitrarily denied; and he brought this suit for damages for his wrongful discharge, which he alleged was accomplished by the railroad's refusal to reinstate him. The plaintiff's cause of action arose under the common law of Texas, and is governed by the law of that state, except to the extent that it may be barred or otherwise affected by federal law.

In *Texas & New Orleans R. Co. v. McCombs, 143 Tex. 257, 183 S. W. 2d 716*, apparently changing the Texas rule in railway employee cases, the Supreme Court of Texas decided that *Moore v. Illinois Central R. Co., 312 U. S. 630*, announced the local law to be applied in similar cases. The *McCombs* decision was prior to *T. & W. Air, Inc. v. Koppal, 345 U. S. 653, 73 S. Ct. 504, 97 L. Ed. 718*, in which the court held that, if the applicable state law requires an employee to exhaust his administrative remedies under his employment contract before filing suit, he must show that he has done so. Nevertheless, regardless of the reason for

the *McCombs* decision, it remains the local law, announced by the highest court in the state. On the authority of this decision, the court below overruled the defendant's second motion to dismiss the complaint, and let the action stand for trial on the following issues:

(1) Was the plaintiff physically able to perform his duties at the time he sought to return to work? (2) did the defendant arbitrarily refuse to permit him to return to work? and (3) the amount of damages that he was entitled to recover.

It is stated in Judge Allred's opinion that, after the filing of briefs on the second motion to dismiss, defendant's counsel conceded that the contract here does not set up the administrative procedure for appeals, but contends that it has been built up by custom. The custom relied on was held by the court below to fall far short of establishing an agreement generally to compulsory submission of such claims to a Board of Adjustment. At most, the court held it merely showed a voluntary submission by the parties of a particular claim.

The court below submitted the case to the jury upon the issues above stated. The verdict rendered in its pertinent part was that the appellee was physically able to perform his duties as conductor on May 29, 1952, and that the appellant's refusal to permit him to resume his duties on or about said date was arbitrary. The jury further found that $6,960 was the amount which would reasonably compensate the plaintiff for loss of employment from May 29,

1952, to the date of the trial, the court having so limited the plaintiff's right to recover future damages in reliance upon *Eubanks v. Galveston, H. & S. A. Ry. Co., 59 S. W. 2d 825*. The court below awarded judgment for the plaintiff against the defendant for said amount, and both sides appealed to this court from said judgment. The appeal of the plaintiff, George C. Moore, Sr., was from that part of the judgment which denied him recovery of damages, to accrue after the date of the trial, for defendant's breach of contract.

We agree with the court below, and with the contentions of appellee, that the remedial provisions of the Railway Labor Act did not require appellee to exhaust his administrative remedy before filing an independent suit for his wrongful discharge; that the findings of the Retirement Board were not conclusive where, as here, the claimant exercised his option to pursue his judicial remedy without first exhausting his administrative remedy; and that appellee was not estopped by having received annuity payments from the Board under the facts and circumstances in this case. The jury, by its verdict, having found that appellee was physically able to perform the duties of his employment as conductor for the defendant on May 29, 1952, and that appellant arbitrarily refused to return him to work on said date, and such verdict being supported by substantial evidence, the court correctly rendered judgment upon such verdict, awarding plaintiff damages for wrongful discharge. The trial court also correctly overruled defendant's motion for an instructed verdict.

We find no reversible error in the record, and think that the judgment appealed from should be affirmed on both appeals. It is so ordered. *Moore v. Illinois Central R. Co., 312 U. S. 630; T. & W. Air, Inc. v. Koppal, 345 U. S. 653; Tex. & N. O. R. Co. v. McCombs, 143 Tex. 257, 183 S. W. 2d 716.* The two memorandums of Judge Allred in this case have not been published, but they are in the record and will be added in an appendix to this opinion.

AFFIRMED.

MEMORANDUM OPINION.
Filed April 29, 1953.
(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, for Plaintiff.

Kleberg, Mobley, Lockett & Weil, *Medical Professional Bldg.*, Corpus Christi, Texas, for Defendant.

Memorandum.

Plaintiff, a resident citizen of Texas, brings this action against defendant, a resident citizen of Missouri. The complaint is in five counts, which really amount to alternative pleadings. Plaintiff alleges:

That he was an employee of defendant under a contract of employment of which the laws of the United States are part, particularly Title 45, Chapters 8 and 9; that on or about October 1, 1924, the railroad entered into a con-

tract with its conductors, represented by the Order of Railway Conductors of America, governing terms and conditions of conductors then in service or who might enter defendant's service, a copy being attached as Exhibit A; that plaintiff entered defendant's employ under such contract about November 1, 1929.

About August 1949, on the advice of his private physician, with defendant's acquiescence, and without resigning or being discharged, plaintiff laid off to follow a regimen recommended by his physician; that about February 15, 1951, having recovered and being in good health for a man of his age, plaintiff presented himself to defendant for resumption of his duties; that defendant, contrary to the contract, refused and still refuses to permit plaintiff to resume and perform his duties; that defendant wrongfully demanded that plaintiff submit to a medical examination by defendant's physician, which requirement was in violation of the contract in which it was stipulated that proper performance of duties would be considered a satisfactory test of physical ability; that this constituted a wrongful discharge of plaintiff to his damage;

In the alternative, plaintiff submitted to an examination by defendant's chief surgeon about February 20, 1951; that the chief surgeon made a written report to defendant, dated March 2, 1951, wrongfully reporting that plaintiff was not physically capable of performing his work, notwithstanding that plaintiff was in good physical condition and capable of performing his duties; that defendant, re-

lying solely on the chief surgeon's report, refused to permit plaintiff to resume performance of his duties which also constituted a wrongful discharge;

Alternatively, after the report of defendant's surgeon plaintiff had himself examined by several competent physicians and surgeons who reported that he was in good physical condition considering his age; that plaintiff furnished these reports to the defendant and requested a hearing which was refused; that this amounted to a wrongful discharge;

Alternatively, about March 6, 1951, when plaintiff received a copy of the chief surgeon's report, he had himself examined by other doctors, including specialists, and again requested a hearing; that this request was granted about May 12, 1951, when plaintiff furnished the reports of his physicians to the defendant and requested that he be given an opportunity to demonstrate his ability to perform his duties; that about August 30, 1951, the defendant refused such request, which amounted to a wrongful discharge;

Alternatively, that after August 30, 1951, plaintiff had other medical examinations made; that about May 1, 1952, he presented all data and information with reference to such examinations to defendant and requested that he be permitted to resume performance of his duties; that about May 29, 1952, defendant attempted to impose conditions upon plaintiff in violation of the contract, among others, that plaintiff agree to waive compensation for the time he had lost by being refused employment theretofore; that this amounted to wrongful discharge;

That plaintiff's physical condition on February 15, 1951, when he originally requested re-employment, was substantially the same as on all other subsequent occasions; that at that time plaintiff had a life expectancy of fourteen (14) years, at least eight of which he would have continued in active duty and the remainder in retirement with benefits; that he had accumulated 22 years seniority and would have acquired 8 more, or a total of 30 years; that his average monthly pay was and would have continued to be $700.00 a month;

Plaintiff sues for $92,600.00 actual damages and $15,000.00 exemplary damages.

Defendant moved for production of documents in connection with plaintiff's application to the U. S. Railroad Retirement Board for disability pension or annuity under the Railroad Retirement Act, setting up that in connection with such application plaintiff made certain statements and representations as to his physical condition and bearing on whether or not plaintiff was defendant's employee at the time of his alleged wrongful discharge.

Plaintiff then filed a motion for production of documents, including various correspondence, allegedly passing between defendant and the Railroad Retirement Board and particularly a copy of a report made by defendant's chief surgeon to the Railroad Retirement Board. Plaintiff opposed defendant's motion for production of documents unless it be conditioned upon defendant's production of the documents plaintiff desires, particularly the report of the chief surgeon to the Board.

Defendant replies that it is willing to produce all of the documents requested by plaintiff excepting the report by the chief surgeon which, defendant claims, it does not have and can not secure; and excepting certain other documents which it has been unable to find after diligent search; and also excepting a demand for production of the record of plaintiff's work time, as requested in Item 15 (since defendant had furnished plaintiff with a full statement of wages paid him;

In connection with plaintiff's demand for production of the chief surgeon's report to the Railroad Retirement Board, plaintiff has attached copies of various letters passing between him and such board with reference to his annuity claim, his request for a copy of the chief surgeon's report and his request that he be given physical examinations by the board which would disclose that he was physically able to return to his duties. Several of these letters show that the board refused plaintiff's request for a copy of the chief surgeon's report on the ground that "it is for use exclusively in the administration of the Railroad Retirement Board."

Thereafter defendant moved to dismiss because:

Prior to September 29, 1949, plaintiff applied to the Railroad Retirement Board for a disability annuity which was granted, and plaintiff is still drawing monthly payments of such annuity; that it has never been set aside and cannot be collaterally attacked in this action; that

plaintiff is estopped, by continued acceptance of the annuity, to contend that he is not disabled and to ask for damages in his action.

While defendant's motion is denominated a motion to dismiss, it is, in reality, a motion for summary judgment, based upon exhibits and plaintiff's deposition.

From the incomplete record before me it appears that:

(1) Prior to May 9, 1947, plaintiff applied to the Railroad Retirement Board for a disability annuity which was denied on or about March 22, 1948, on the ground that he was less than 60 years of age, had less than 20 years service and was not totally and permanently disabled for hire, and did not qualify "under section 2(a) 5 of the Railroad Retirement Act of 1937";

(2) Thereafter plaintiff applied to defendant for reinstatement and compensation for time lost; his union filed a grievance complaint which resulted in his reinstatement; he resumed his services about June 7, 1948, and continued through August 18, 1949.

(3) Sometime prior to September 29, 1949, plaintiff again applied for (or renewed his previous application), to the Railroad Retirement Board for a disability annuity; this was granted by the Board of December 16, 1949 (but effective August 19, 1949); plaintiff is still receiving this annuity, in monthly payments; it was awarded "principally upon the basis of arthritis" and a finding that he was disabled for work in his employment;

(4) On August 8, 1951, plaintiff wrote the Board that he was anxious to resume his duties, and believed he was physically able to do so; that on March 2, 1951, defendant's chief surgeon had recommended that plaintiff not resume his duties; that thereafter he had been examined by doctors in Houston, San Antonio and Kingsville whose findings differed from the chief surgeon's; plaintiff, therefore, requested the Board to have him examined to see if he still was entitled to receive his annuity.

(5) On December 26, 1951, the Board advised that, after considering general and specialized examinations, including the one of March 2, 1951, defendant's chief surgeon, they still considered him "permanently disabled for work" in his regular occupation; that the Board had no jurisdiction over employment practices of the railroads and the question of re-employment was purely a matter between plaintiff and his former employer;

(6) Plaintiff wrote Senator Lyndon Johnson who, in turn, took the matter up with the Board; Senator Johnson was advised by the Board on July 3, 1952, that their regulations provided that a recipient of disability annuity report to them if he had recovered; and, that in view of plaintiff's letter to the Senator, the Board was arranging to have specialized examinations made of him to determine if he had recovered and was "no longer entitled to the annuity benefits which he is now receiving"; at the same time the Board requested plaintiff to report to the Veteran's Administration Regional Office at San Antonio for the examination;

(7) On July 12, 1951, plaintiff wrote the Board that apparently the request for re-examination had been made "by some one other than myself"; that the Board had had plaintiff examined at his own request, in October, 1951, by Dr. A. C. Jones of Kingsville and had advised that his standing would remain unchanged; that he did not object to the examination but would like to know who made the request and for what purposes;

(8) The examination was made at San Antonio and, on August 19, 1952, the Board advised plaintiff as follows:

"Our records show that you were awarded an annuity principally upon the basis of arthritis and that the annuity has been continued uninterrupted since the award was approved in your favor. The report received from the Veterans Administration Hospital which covers a series of specialized examinations shows substantially the same disability which was present at the time your claim for a disability annuity was approved. The x-ray showed a curvature of the cervical spine, a distinct lipping on the lower cervical vertebrae, a slight lipping on the lower dorsal vertebrae and calcification in the lower dorsal interspaces. Upon the basis of these x-ray studies, a diagnosis of arthritis of the spine was confirmed and continued in effect. Under this decision no change is indicated in the disability status of your claim insofar as your right to receive a disability annuity is concerned. As previously stated, the Board has no jurisdiction over the question of whether the employer returns you to work in your regular occupation."

(9) Plaintiff tried several times to secure a copy of the report to the Board of defendant's chief surgeon as to his findings, but the Board refused to furnish it on the ground that "any report of physical examination, regardless from whom it may have been received, is for use exclusively in the administration of the Railroad Retirement Act."

Plaintiff was granted his annuity in 1949 under the provisions of 45 U. S. C. A. 228b(a) 4(i), upon a finding that his permanent physical or mental condition was such as to be disabling for work in his regular occupation, having completed 20 years of service, Section (a) 4 further provides, in part:

"The Board, with the cooperation of employers and employees shall secure the establishment of standards determining the physical and mental conditions which permanently disqualified employees for work in the several occupations in the railroad industry, and the Board, employers and employees shall cooperate in the promotion of the greatest practicable degree of uniformity in the standards applied by the several employers. *An individual's condition shall be deemed to be disabling for work in his regular occupation if he will have been disqualified by his employer because of disability for service in his regular occupation in accordance with the applicable standards so established* * * *." (Emphasis supplied.)

Section (a) 5, provides in part:

"Such satisfactory proof shall be made from time to time as prescribed by the Board, of the disability provided for

in paragraph 4 or 5 of this subsection *and of the continuance of such disability (according to the standards applied in the establishment of such disability)* until the employee attains the age of sixty-five. If the individual fails to comply with the requirements prescribed by the Board as to proof of the *continuance of the disability* until he attains the age of sixty-five years, his right to an annuity shall, except for good cause shown to the Board, cease, but without prejudice to his rights to any subsequent annuity to which he may be entitled. If before attaining the age of sixty-five an employee in receipt of an annuity under paragraph 4 or 5 of this subsection is found by the Board to be no longer disabled as provided in said paragraphs his annuity shall cease upon the last day of the month in which he ceases to be so disabled. An employee, in receipt of such annuity, who earns more than $75 in service for hire, or in self-employment, in each of any six consecutive calendar months, shall be deemed to cease to be so disabled in the last of such six months; and such employee shall report to the Board immediately all such service for hire, or such self-employment. If after cessation of his disability annuity the employee will have acquired additional years of service, such additional years of service may be credited to him with the same effect as if no annuity had previously been awarded to him." (Emphasis supplied.)

It is defendant's contention that the Board has jurisdiction, not only to determine the existence of a claimed disability originally, but, once found, whether the disability continues from time to time if it is called in question; that

the Board's decisions are not subject to review by other administrative agencies or accounting officers, under 45 U. S. C. A. 228j (b) 1; and can only be reviewed by the Courts, under 228k of Title 45, by a proceeding brought for that purpose, upon a showing that it is clearly and manifestly wrong. There is no doubt that such is the rule in cases where the Board denies an application for an annuity; the order will stand if supported by substantial evidence and not in violation of law. Gardner v. Railroad Retirement Board, 5th Cir., 148 F. 2d 935. Watts v. Railroad Retirement Board, 5th Cir., 150 F. 2d 113; Welborn v. Board, 5th Cir., 151 F. 2d 448; Squires v. Board, 5th Cir., 151 F. 2d 182; Wheeler v. Board, 8th Cir., 184 F. 2d 173; Robinson v. Board, 8th Cir., 184 F. 2d 703.

Unquestionably, the same rule would apply in an action by an employee where the Board discontinued an annuity upon a finding that the disability no longer existed. But does the statute require such a direct proceeding for judicial review where the Board has found that the disability still exists? As shown by the emphasized portions of the statute quoted above, the Board has power to require satisfactory proof from time to time of the continuance of the disability; and, if the beneficiary fails to comply with such requirement, or if the Board finds that he is no longer disabled, his annuity ceases. Subsection 228i authorizes recovery and adjustments of annuities erroneously paid; and protects from liability certifying or disbursing officers acting in good faith.

This is an anomalous, indeed a peculiar case. It would be supposed that ordinarily the Board would accept an annuity recipient's claim that he had recovered and stop paying him an award he says he does not want. All the reported cases are complaints that the Board has wrongfully denied an annuity to a claimant, not that it had continued one he no longer is entitled to.[1] An additional oddity is the fact that here the employee continues to accept his annuity although he says he is not entitled to, and does not want, it.

As pointed out, the statute grants to the Board jurisdiction and broad powers to determine disability originally and, from time to time, whether it still exists. 45 U. S. C. A. 288j, (b) 1 provides that the Board "shall have and exercise all the duties and powers necessary to administer sections 228a-228r." Subsection 228k provides that decisions of the Board determining the rights and liabilities of any person[2] under sections 228a to 228c-1 "shall be subject to judicial review in the same manner," etc., as under chapter 11 (of the Railroad Retirement Act, 45 U. S. C. A. 355f) by filing a petition for review against the Board, in the district Court where the claimant re-

[1]Utah Copper Co. v. Railroad Retirement Board (D. C.) 41 Fed. Supp. 763, aff. 10th Cir., 113 F. 2d 358; Railroad Board v. Daiquesne Co., 326 U. S. 446, and Dispatch Shops v. Railroad Retirement Board, 2nd Cir., 154 F. 2d 417, were actions by employers to set aside Board holdings that they were employers under the act.

[2]Under this, I suppose, defendant could have petitioned for a judicial review of the continuance of this annuity, since "person" is defined in subsection 228n to include a corporation; and in old subsection 228k, a part of the Act of 1937, the right to Court relief was accorded to "any employee or other person aggrieved."

sides, within one year. And, as held in the cases, the Board's decision can only be set aside where not supported by substantial evidence and in violation of law.

Notwithstanding the broad language of the statute, I doubt that Congress contemplated that there ever would be an appeal by an annuity beneficiary for judicial review of an order awarding him a continuance of his annuity on the ground that his disability had ceased. Among other reasons for this view, in addition to the anomaly of the situation itself, are the following: (1) the provisions for recovery or adjustment of annuities erroneously paid; (2) the fact that subsection 228k provides that proceedings for review of a decision with respect to an annuity must be commenced within one year after the decision is entered upon the Board's records and communicated to the claimant; and (3) the provisions of subsection 228b(b), reading as follows:

"(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; *but this requirement shall not apply to the individual mentioned in subdivision 4 and subdivision 5 of subsection (a) prior to attaining age sixty-five.*" (Emphasis supplied.)

Plaintiff, coming within the foregoing emphasized exception, says that the effect of the Board's refusal to find that he has recovered and to discontinue his annuity is to

compel him to relinquish his right to return to his employment. The Board disclaims jurisdiction of the question of re-employment saying in its letters, that this is a matter between plaintiff and defendant. Nevertheless, the fact remains that plaintiff invoked the Board's jurisdiction originally, reinvoked it on the question of his recovery and continues to accept the benefits of an award, based upon a finding that he is, and has been since 1946, disabled for work in the very employment he says he is now able to resume. The Board made its findings over plaintiff's protests, just as it made findings that certain companies were employers in the cases cited in footnote 1, supra. Plaintiff's whole argument here that the Board acted arbitrarily and in violation of law; that its decision was the result of collusion with, or procurement of, defendant.

Plaintiff had the right to make those contentions and have them decided in a direct proceeding for review brought under subsection 355f. But the finding, upon which the annuity is based, is not res judicata which does not apply to administrative decisions. 50 C. J. 3. 29, sec. 606. So the situation is not unlike one where a claim for total permanent incapacity is made under the Workmen's Compensation laws and it is shown that the claimant had been found to be so incapacitated in a previous action. It is a question of fact whether he had recovered from the previous condition.

Defendant's plea of estoppel is based upon the foregoing and the fact that plaintiff has continued to collect his

annuities. Ordinarily of course, in order to create an estoppel, the party invoking the doctrine must have acted or been misled to his prejudice; but estoppel frequently is based upon acceptance or retention of benefits, a branch of the rule against inconsistent positions, referable to the principle of election rather than to that of equitable estoppel. 19 Am. Jur. 682. At this time the record is not sufficiently developed for me to say that plaintiff is so estopped.

The appellate Courts repeatedly have cautioned trial Courts to carry motions for summary judgment along with the case until all the evidence is in, especially in close cases, such as this one. I shall do that here.

Defendant's motion for summary judgment, therefore, is overruled and will be carried along with the case.

As indicated upon pre-trial, both motions for production of documents are granted as to all documents the parties are able to secure; excepting that defendant will not be required to produce the record of plaintiff's work time, as requested in item 15.

The Clerk will notify counsel.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas.
April 29, 1953.

MEMORANDUM OPINION

Filed November 19, 1953

(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, for Plaintiff.

Kleberg, Mobley, Lockett & Weil, Jones Bldg., Corpus Christi, Texas, for Defendant.

Memorandum

Action by plaintiff for wrongful discharge. Reference is here made to a memorandum dated April 29, 1953, overruling defendant's motion for summary judgment based upon plaintiff's failure to file a direct proceeding for a judicial review of a decision of the United States Railroad Retirement Board.

Defendant has filed a second motion to dismiss based upon plaintiff's failure to allege exhaustion of his remedies under the employment contract between the railroad and plaintiff's union. Article 21 of such contract provides that conductors shall not be unjustly discharged or disciplined; that in case a conductor believes he has been unjustly discharged or disciplined, he shall have the right within ten days to make complaint in writing, and, upon request, be granted a hearing within ten days; that if dissatisfied with the decision he may appeal to "higher authority."

Defendant bases his motion upon a recent decision of the U. S. Supreme Court in Transcontinental & Western Air, Inc. v. Koppal, 346 U. S. 653, 73 S. Ct. 907, 97 L. Ed. 863, in which the Court amplifies Moore v. Illinois Central R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089; and holding that, if the applicable State Law requires an employee to exhaust his administrative remedies under his employment contract before instituting Court action, he must show that he has done so Defendnat points to the Texas rule announced in the cases[1] requiring a discharged or dissatisfied employee to exhaust his remedies, if required b the contract, before resorting to the Courts.

Defendant frankly concedes that a later decision by the Texas Supreme Court, Texas & New Orleans R. Co. v. McCombs, 143 Tex. 257, 183 S. W. 2d 716, seemingly changes the Texas rule in railway employee cases; but pointing to the fact that the McCombs decision was prior to the Supreme Court decision in the Koppal case, and that the Texas Supreme Court did not discuss the general rule in Texas, defendant insists that the Texas Supreme Court apparently decided McCombs on the theory that Moore v. Illinois Central announced the law to be applied to railroad employment cases regardless of the local law.

It is true that the Texas Supreme Court decided the McCombs case in the light of the Moore case and "for the

[1] Among others, Wyatt v. Kansas City Southern R. Co. (Tex. Civ. App.), 101 S. W. 2d 1082; Swilley v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.), 96 S. W. 2d 105; Cousins v. Pullman Co., 72 S. W. 2d 356; Matlock v. Gulf C. & S. F. Ry. Co. (Tex. Civ. App.), 99 S. W. 2d 1056; St. Louis, B. & M. Ry. Co. v. Booker (Tex. Civ. App.), 5 S. W. 2d 856. See also 7 Tex. Jur., Ten Year Supp. 195, sec 114a.

sake of uniformity of decision"; and stated that it "should follow the Moore case rather than the decisions of the Court of Civil Appeals." The Texas Supreme Court expressly refers to Wyatt v. Kansas City So. Ry. Co., supra and "similar decisions."

Regardless of the basis of the McCombs decision, it remains the local law, announced by the highest Court in this State in railroad employee cases. The employment agreement in the McCombs case contained stronger language and more specific details as to procedure for seeking relief than the one here involved. The Texas Supreme Court held that while the McCombs agreement gave him the right to appeal to the highest company offials, it did not require him to do so; and that there was nothing in that agreement that required the employee to seek administrative relief as a condition precedent to Court action. While the case dealt with a claim for overtime, there is no distinction in principle from a like provision dealing with unlawful discharge.

After the filing of briefs on the second motion to dismiss, defendant's counsel concedes by letter that the contract here involved does not set up the administrative procedure for appeals but contends that it has been built up by custom. In support of this contention counsel has furnished the Court with a copy of an award and opinion by "Special Board of Adjustment No. 24, Missouri Pacific Lines in Texas and La. v. BLF & E, ORC and BRT, Docket No. 101, Case No. 116, 915-5," involving a claim by the estate of Conductor M. C. Barnes, an employee of defend-

ant, for time lost after he had reported back for duty and before his application for annuity retirement had been granted by the Railroad Retirement Board. The Special Board of Adjustment was composed of a chairman, a representative of the employee and a representative of the employer. This falls far short, however, of establishing an agreement generally as to compulsory submission of such claims to a Board of Adjustment. At most, it merely shows a voluntary submission of the Barnes claim by the parties in the nature of arbitration.[2]

Defendant's second motion to dismiss, therefore, is overruled. The Clerk will notify counsel.

The action will stand for trial on the following issues: (1) was plaintiff physically able to perform his duties at the time he sought to return; (2) Did defendant arbitrarily refuse to permit him to return to work; and (3) If so, the amount of damages. Defendant's first motion to dismiss will be carried along with the case.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas,
November 19, 1953.

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[2]The decision, however, is interesting and probably decisive here of one disputed question raised by plaintiff's pleading, quoted in the original memorandum, this "proper performance of duty would be considered a satisfactory test of physical ability" to do so. Barnes had applied for and was granted a leave of absence because of his health. Thereafter, and before expiration of his leave, Barnes reported back for duty. Defendant's superintendent referred him to the Chief Surgeon for physical examination. He was examined by a physician at the request of the Chief Surgeon, who found that, unless Barnes improved considerably in the future, he should not be put back to work. Defendant's superintendent refused to permit Barnes to return to work until he reported to the

MEMORANDUM OPINION

Filed April 6, 1954

(Title Omitted)

J. Marvin Ericson, Medical-Professional Bldg., Corpus Christi, Texas, for Plaintiff.

Kleberg, Mobley, Lockett & Weil, Jones Bldg., Corpus Christi, Texas, for Defendant.

Memorandum

Action by plaintiff for damages for discharge from employment. Reference is here made to a memorandum dated April 29, 1953, overruling defendant's motion for sum-

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Chief Surgeon for physical examination and received his okay. Barnes failed to do this.

Later he made application to the Railroad Retirement Board for retirement. This was granted. Meantime, however, he had filed claim for time lost between the date he reported back for service and the effective date of his retirement annuity. The Special Board, after reviewing all the facts, denied the claim, holding that where the evidence showed serious doubt as to a conductor's physical capacity to satisfactorily perform his duties, the carrier's request for physical examination by the Chief Surgeon was not unreasonable.

That decision also disposes of the contention pleaded and vigorously asserted by plaintiff in his original brief, i.e., that a provision appearing in an agreement between the I. & G. N. Railroad Co. and its employees has become a part of the agreement with St. L. & B. & M. employees. The provision was: "The proper performance of their duties will be considered satisfactorily test of physical ability of all employees now in service." The decision of the Special Board of Adjustment expressly find that this provision does not apply to defendant's employees; that: "That rule is not contained in the agreement covering working conditions of conductors on the St. Louis, Brownsville and Mexico, the railroad here involved. A review of St. L. B. & M. agreement will confirm this fact. The I. G. N. and the St. L. B. & M. agreements are two separate and distinct agreements, covering two separate properties insofar as rules governing the working conditions of employees in train and engine service is concerned."

On brief and upon pre-trial plaintiff's counsel condeded that the written agreement, attached to his complaint, did not contain the quoted provision; but, insisted, as did Barnes' estate before the Special Board, that it had been incorporated in a 1947 conference in Houston, "with an understanding in regard to servicemen returning from the government service." In any event, plaintiff does not claim to be a returning serviceman.

mary judgment because plaintiff did not file a direct proceeding for judicial review of the decision of United States Rail Retirement Board finding that he was still unable to work; and to a memorandum of November 19, 1953, overruling a second motion to dismiss because of plaintiff's failure to allege that he had exhausted his remedies under an employment contract between the railroad and plaintiff's union.

Plaintiff had alleged, by alternative counts, that he was physically able to perform his duties as a conductor on or about (a) February 20, 1954; (b) March 6, 1951; (c) July 30, 1951; (d) May 29, 1952; but that defendant arbitrarily refused to permit him to resume his duties upon each and all of such dates. A jury found that plaintiff was able to perform his duties on or about May 29, 1952, and that defendant arbitrarily refused to permit him to resume his duties at that time. The jury awarded plaintiff $6,960 for his damages, measured by his probable earnings between May 29, 1952 and the date of trial. The recovery was limited to his probable earnings to the time of trial, under Eubanks v. Galveston, H. & S. A. Ry. Co. (Tex. Comm. App.), 59 S. W. 2d 825.

Plaintiff moves for judgment in excess of the amount awarded by the jury, and, alternatively, for judgment on the verdict Defendant moves for judgment non obstante veredicto based upon (a) the motions to dismiss heretofore urged, overruled and carried along with the case; (b) the fact that, notwithstanding plaintiff's alternative allegations as to his physical ability on the various dates,

he had actually applied for re-instatement in February 1951 and had been rejected then; that the subsequent dates were in actually appeals to a higher authority, not new applications to return to work; that there was, in reality, only one application to return to work (that of February 1951) and, since the jury found that plaintiff was not physically able to perform his duties in February 1951, he is not entitled to recover upon a finding that he was able to perform his duties May 29, 1952.

Article 21 of the employment contract provided that conductors should not be unjustly discharged or disciplined; that a conductor who believed that he had been unjustly discharged or disciplined should have the right, within ten days, to make complaint in writing to the railroad and be granted a hearing within another ten days; that, if dissatisfied with the decision, he could appeal to higher authority.

As pointed out in the memorandum of November 19, 1953, this provision for application, appeal, etc. did not set up administrative procedure for appeals. It was silent as to what official of the railroad an application to resume employment should be made, or an appeal taken. The facts here show that neither party concerned themselves with technical details as to procedure; and, while plaintiff in his letter to Sheffield, dated May 1, 1952, referred to his application as an "appeal for reconsideration," yet, after the initial refusal by defendant's chief surgeon Sublett, plaintiff continued to submit to additional medical exami-

nations and furnished additional evidence as to his physical condition to defendant in support of each effort he made to return to work.

Defendant's motions will be overruled and plaintiff's alternative motion for judgment on the verdict is granted. A judgment, is being entered in accordance with the verdict. The Clerk will notify counsel.

JAMES V. ALLRED,
Judge.

Corpus Christi, Texas,
April 6, 1954.

Office - Supreme Court, U. S.
FILED
SEP 21 1955
JOSEPH F. SPANIOL, Clerk

No. 359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

GEORGE C. MOORE, SR., *Cross-Petitioner*,

v.

GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, DEBTOR, *Cross-Respondent*

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

LESLIE S. LOCKETT
Of Counsel
Corpus Christi, Texas

PALMER HUTCHESON,
Attorney for Petitioner,
Houston, Texas

Austin Law Printing Co., 402 E & M Bldg., Houston 2

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No. 339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

GEORGE C. MOORE, SR., *Cross-Petitioner*,

v.

GUY A. THOMPSON, Trustee, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, Debtor, *Cross-Respondent*

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Cross-Respondent, Guy A. Thompson, Trustee, The St. Louis, Brownsville & Mexico Railway Company, files this brief in opposition to the cross-petition for writ of certiorari filed by cross-petitioner George C. Moore, Sr.

In the cross-petition, the statement is made "petition for rehearing in the Court of Appeals was denied by that court May 24, 1955". That motion for rehearing was filed by

cross-respondent, Guy A. Thompson, Trustee, and did not ask for any review of the holding of the Court of Appeals sought to be reviewed by this cross-petition. The only holding by the Court of Appeals complained of by cross-petitioner was in its opinion and judgment April 22, 1955. The cross-petition was filed more than ninety days after April 22, 1955, and therefore, is too late under Rule 22 of this Court.

The fact that the Court of Appeals was asked (by cross-respondent) to change its holding in some matter other than that sought to be reviewed in this cross-petition does not extend the time for filing such. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206.

In the cross-petition there are two fundamental assumptions, each of which is erroneous: (1) that the collective bargaining agreement "is not unilaterally terminable" or, differently stated by cross-petitioner, that such agreement continues "until terminated or altered by mutual agreement" or that cross-petitioner's contract was one for lifetime employment; and (2) that cross-petitioner could recover damages for any time after the trial.

The language of the contract (R. 251) is that the contract shall be effective for one year after October 1, 1924 "and thereafter until 30 days' notice in writing has been given either party to the other . . . " From the fact that the provision for such notice requires a listing of changes desired and provides there shall be conferences, cross-petitioner reasons that the above specified period is lengthened until the parties agree that there shall be, or shall not be, changes. But no words expressly or impliedly providing for that are used. According to the contract, it terminates thirty

days after either party gives the other notice. If the parties had intended that the contract would continue while negotiations as to desired changes were had, it would certainly have been easy to add words to that effect. They did not so provide. The court is bound to enforce the contract agreed upon and cannot make a contract for the parties.

Additionally, Texas law is well settled that damages for breach of an employment contract may be recovered only to the date of trial. Under *Trans-Continental and Western Air, Inc. v. Koppal,* 345 U.S. 653, if the employee wants to claim damages rather than reinstatement and loss of time, he may resort to a state recognized cause of action, but subject to all limitations in such state law.

In addition to *Eubanks v. Galveston, H. & S.A. Ry. Co.,* (Tex. Comm. App.), 59 S.W. 2d 825, followed by the trial court and the Court of Appeals in limiting cross-petitioner's damages to those up to the time of trial, we call the court's attention to other announcements of Texas law to that effect. In 29 *Texas Jurisprudence,* page 36, Master and Servant, Section 19, it is said:

> "*Measure of damages* . . . The method of computing the damages suffered by one who was employed on a salary is to debit the employer with the whole amount due from the pay-day before discharge down to the date of trial (if the suit is brought before the end of the term) or down to the end of the term (if the suit is brought after the end of the term); . . . "

In addition to the *Eubanks* case, the text cites *Stolz v. Wells* (Tex. Civ. App.), 43 S.W. 2d 163 (no writ history) which holds that where an employment contract is terminable on notice, damages for its breach are limited to those accruing

during the period for notice specified in the contract even though no notice of termination was given. Trial was after the notice period.

A more recent case so limiting damages is *Niles v. Parsons* (Tex. Civ. App.), 239 S.W. 2d 740 (no writ history) holding that the maximum damages recoverable for breach of an employment contract are for the period from breach to the date of trial, even though the contract is for a definite period, if the trial is before the date set in the contract for its expiration. The court said:

> "We agree with the contention of appellant that the maximum recoverable by appellee herein is the sum he would have received under the contract of employment from the time it was breached to the date of trial and *not to the end of the contract period.* 29 *T. J.*, p. 35, Sec. 19; *Lichtenstein v. Brooks*, 75 Tex. 196, 12 S.W. 975; *Southern Properties, Inc. v. Carpenter* (Tex. Civ. App.), 300 S.W. 963." (Emphasis added.)

See also *Lone Star Cotton Mills v. Thomas* (Tex. Civ. App.), 227 S.W. 2d 300. The agreement there provided that it was effective for one year and it

> "shall automatically continue beyond the said date for one year or more unless either party to the agreement gives the other party hereto notice of its desire to alter, revise, or terminate this agreement at least thirty days prior to any anniversary date." (227 S.W. 2d at 305-6).

In a suit for damages, the court said at page 309:

> "The case of Eubanks v. Galveston H. & S. A. Ry. Co., Tex. Comm. App. 59 S.W. 2d 825 is deemed to have some bearing here. It was there held that a contract

having a marked similarity was not a contract of life employment. It is thought it is a fair inference from the case that damages may be recovered to the date of trial unless the contract had been sooner terminated in accordance with its provisions. It is thought that damages to the date of trial would be all that plaintiff would be entitled to recover."

Cross-respondents therefore say that the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

Attorney for Cross-Respondent

LESLIE S. LOCKETT
Of Counsel
Corpus Christi, Texas